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IN THE

Supreme Court of the United States

October Term, 1985

RHETT G. CAMPBELL, TRUSTEE,

Petitioner,

v.

WELLS FARGO BANK, N.A.,
FIRST SECURITY BANK OF UTAH, N.A.,
FIRST SECURITY LEASING/VALLEY PARTNERSHIP NO. 1,
a General Partnership, and
FIRST SECURITY/VALLEY PARTNERSHIP NO. 1,
a General Partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a plaintiff seeking to maintain an action against a bank under the broad anti-tying provisions of 12 U.S.C. §§ 1971-1975 (the "Bank Tying Act"), which provides in Section 1975 that "[a]ny person who is injured in his business or property" has a private right of action, must demonstrate that such plaintiff's injury is a "direct consequence" of the unlawful conduct of which it complains, as is required by certain precedents involving the anti-trust statutes?

2. Whether, assuming that anti-trust standing limitations are applicable to suits under the Bank Tying Act, a plaintiff has a private right of action against a bank under circumstances in which the bank injured its immediate customer with the actual or

constructive knowledge that such injury would automatically and directly flow through to such plaintiff through the operation of state mechanic's and materialmen's lien statutes?

LIST OF ALL PARTIES

PETITIONER

The Petitioner is Rhett G. Campbell, Trustee of the Tiger Oil and Tiger Drilling Creditors Trust. Joseph C. Canizaro was also a Plaintiff-Intervenor/Appellant in the court below.

RESPONDENT

The Respondents in this case are Wells Fargo Bank, N.A., First Security Bank of Utah, N.A., First Security Leasing/Valley Partnership No. 1, and First Security/Valley Partnership No. 1.

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IN THE
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RHETT G. CAMPBELL, TRUSTEE,

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v.

WELLS FARGO BANK, N.A.,
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FIRST SECURITY LEASING/VALLEY
PARTNERSHIP NO. 1, a General Partnership,
and FIRST SECURITY/VALLEY PARTNERSHIP
NO. 1, a General Partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Rhett G. Campbell, Trustee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 28, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 781 F.2d 440-43, and is reprinted in Petitioner's Appendix ("Pet. App.") at Pet. App. A1-A7.

The Memorandum Rulings of the United States District Court for the Western District of Louisiana (Stagg, D.J.) are not reported. Copies of such Memorandum Rulings are provided at Pet. App. D1-D28 and E1-E9.

JURISDICTION

The judgment of the Court of Appeals was filed on January 28, 1986. The Petitioner thereupon timely filed a petition for rehearing and suggestion for en banc consideration which were both denied on February 28, 1986. Pet. App. at B1-B2. This Court's juris-

diction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

12 U.S.C. § 1975 (1982). **Civil actions by persons injured; jurisdiction and venue; amount of recovery**

Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioner is the Trustee of the Tiger Oil and Tiger Drilling Creditors Trust (the "Tiger Trust"). On July 2, 1984, Petitioner filed his Plaintiff's First Amended Complaint in the United States District Court for the Western District of Louisiana, Shreveport Division (a copy of which is included at Pet. App. F1-F65) which alleged in Count I that Respondents Wells Fargo Bank, N.A., et al. (referred to hereinafter collectively as the "Banks"), had committed acts which were unlawful under 12 U.S.C. §§ 1971-1975 (1982) (hereinafter the "Bank Tying Act"), resulting in significant damages to the Tiger Trust.

Summarizing the allegations of Petitioner's Amended Complaint, the Petitioner alleges that the Banks engaged in a series of lending practices

with respect to Latham Exploration Company, Inc. ("Lexco") and its affiliates which dramatically affected Lexco's abilities to carry out its normal business activities and which were violations of the Bank Tying Act. For example, the Banks tied their extensions of credit to Lexco (some of which credit was never extended as promised) to the guaranty by Lexco of certain indebtedness of affiliates owed to subsidiaries of the Banks for which there was no legitimate business justification. The Tiger Trust is the owner of certain legal and equitable interests in five oil and gas wells (the "Tuscaloosa Wells") drilled by Lexco in Pointe Coupee Parish, Louisiana. Petitioner alleges that because of the unlawful lending practices of the Banks, Lexco was unable to pay for materials and ser-

vices used in the drilling and completion of the Tuscaloosa Wells,[1/] leading to the filing of more than $21 million in mechanics' and materialmen's liens against such wells. Under Louisiana law, these mechanics' and materialmen's liens encumber the interests of all owners of the wells, including the ownership interest of the Tiger Trust. The Banks knew at the time of the unlawful acts that Lexco was drilling the Tuscaloosa Wells, and knew that the Tiger Trust and others had acquired interests in the wells. Thus, Petitioner alleges that the direct and foreseeable result of the Banks' unlawful

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[1/] On October 17, 1983, Lexco filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Louisiana, Shreveport Division, Case No. 583-01408-S.

acts was significant diminution of the value of Petitioner's property interests in the Tuscaloosa Wells.

On October 2, 1984, prior to any discovery in the case, the United States District Court for the Western District of Louisiana issued a Memorandum Ruling (copy attached at Pet. App. D1-D28) which granted the Banks' Motion to Dismiss the Petitioner's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The basis for this ruling was that since the Tiger Trust had not directly been a "customer" of the Banks, it lacked standing to maintain an action under the Bank Tying Act. Pet. App. at D-22. The district court's order of dismissal was without leave to amend.

On December 28, 1984, the district court issued a second Memorandum Ruling (copy attached at Pet. App. E1-E9)

affirming its earlier order of dismissal without further analysis, but which also certified the issue to the Fifth Circuit pursuant to 28 U.S.C. § 1292(b) (1982) as requested by Petitioner. The district court conceded that "there are no cases which deal with this precise issue" and acknowledged that there was substantial room for disagreement since "another court could conclude, as suggested by plaintiff, that the broad language of the statute means precisely what it says." Pet. App. at E4-E5. Convinced that the broad language of the Bank Tying Act did, in fact, mean precisely what it said, Petitioner filed a Petition for Permission to Appeal with the United Sates Court of Appeals for the Fifth Circuit which was granted on March 4, 1985. Pet. App. at C1-C2.

On January 28, 1986, a panel of the court below (hereinafter the

"Panel") issued its Opinion (hereinafter the "Panel Opinion," a copy of which is attached at Pet. App. A1-A7) affirming the district court's dismissal of Petitioner's Complaint. The Panel conceded that this case presented an issue of first impression and expressly rejected as erroneous the district court's holding that only bank "customers" have standing to bring actions under the Bank Tying Act. Pet. App. at A5. However, while characterizing the legislative history of the Act as "sparse," id., the Panel nevertheless concluded that standing under the Bank Tying Act must be governed by the confusing tests devised with respect to Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15 (1982) (the "Clayton Act"). Measuring Petitioner's allegations against the standards applicable to antitrust actions, the Panel held that as a matter

of law the Tiger Trust did not allege injuries that were a "direct consequence of the defendant's activities," Pet. App. at A7, and affirmed the district court's order of dismissal. Again, such dismissal was ordered without affording Petitioner leave to amend in order to attempt to meet the standing requirement announced for the first time in this case.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THIS CASE PRESENTS A QUESTION OF SIGNIFICANT IMPORTANCE AND BROAD APPLICATION.

The anti-tying provisions of the Bank Tying Act were enacted by Congress in 1970 as part of a series of amendments to the Bank Holding Company Act of 1956, 12 U.S.C. § 1841, et seq. (1982) (hereinafter the "Bank Holding Company Act"), designed to provide "adequate

safeguards against the possibility of misuse of the economic power of a bank." S. Rep. No. 1084, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5535. Section 1975 of the Bank Tying Act provides a private right of action to "[a]ny person who is injured in his business or property by reason of anything forbidden in Section 1972." Despite both the broad language of this statutory provision and its remedial character, the lower court (the Fifth Circuit) has held in this case that Petitioner lacks standing to maintain any tying action against the Banks. The basis for the lower court's holding was that the injuries alleged by Petitioner were not a "direct consequence" of the unlawful conduct of which Petitioner complains. In so holding, the lower court decided an important question of first impression with

respect to the Bank Tying Act in a manner that could have potentially far reaching and unanticipated consequences for plaintiffs under a large number of federal remedial statutes.

Largely because the language of Section 1975 is virtually identical to that employed in Section 4 of the Clayton Act,[2/] the Fifth Circuit held

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[2/] Section 4 of the Clayton Act provides in pertinent part as follows:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (Supp. 1985).

that precedents developed with respect to standing under the antitrust statutes were applicable to impose a "direct injury" requirement upon plaintiffs under the Bank Tying Act.[3/] However, the similarity of language between Section 1975 of the Bank Tying Act and Section 4 of the Clayton Act is not confined to those two statutes. A host

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3/ Although the lower court also appeared to find support for its application of antitrust standing limitations to the Bank Tying Act in its conclusion that the "purpose" of the Act was to apply the antitrust laws to the field of commercial banking, Pet. App. at A5, it is clear that the Bank Tying Act was not enacted for any such reason. Congress specifically defined the term "Antitrust laws" in 15 U.S.C. § 12 (Supp. 1985). The Bank Tying Act is not one of the statutes included within such definition. Indeed, as discussed infra at Section III, Congress enacted the Bank Tying Act for purposes that were not served by the antitrust laws and determined not to amend the antitrust laws to accomplish such purposes.

of other federal statutes,[4/] including the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), 18 U.S.C. §§ 1961-1968 (1982), employ the same or very similar language in providing a private right of action. The lower court's decision in this case suggests that the standing issues which have proven so perplexing in the anti-trust context will soon afflict plaintiffs under a variety of important federal remedial statutes for which such limitations were not designed. This wholesale importation of standing

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[4/] Examples of statutes with the same or similar language include 7 U.S.C. § 2305(c) (1982) (unfair trade practices affecting producers of agricultural products); 12 U.S.C. § 1464(q) (1982) (unlawful credit practices by federal savings and loan associations); 15 U.S.C. § 72 (1982) (unfair importation of articles at less than market value); 28 U.S.C. § 1343 (1982) (civil rights); 28 U.S.C. § 1357 (1982) (injuries under federal laws); and 46 U.S.C. § 1227 (1982) (discrimination under the Merchant Marine Act).

barriers is particularly alarming in light of the fact that it would occur without any serious consideration of the policies behind adoption of such barriers in the antitrust context, and would be based primarily upon the presence of language which Congress did not know at the time of its adoption would be subjected to such a narrow interpretation.

It was not until 1983 that this Court found a direct injury requirement to be applicable to Section 4 of the Clayton Act. See Assoc. General Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) (hereinafter "Associated General Contractors"). However, in doing so this Court did not find that the statutory language chosen by Congress required such a restrictive interpretation. Indeed, the Court expressly recognized that "[a] literal

reading of the statute [§ 4] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." Id. at 529. The Court determined in Associated General Contractors that a direct injury requirement was applicable to the Clayton Act -- not because of any such indication in the language of the statute -- but because there were indications in the legislative history that Congress had intended to preserve certain limitations that were applicable at common law. Id. at 531-35. There are no such indications in the legislative history of the Bank Tying Act.[5/] Petitioner submits that

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[5/] In fact, the legislative history of the Bank Tying Act contains clear indications that Congress meant its language to be interpreted literally. In introducing an amendment to the anti-tying provisions of the Bank

Footnote continued on next page.

any imposition of a "direct injury" requirement upon plaintiffs under federal statutes employing language similar to Section 4 of the Clayton Act should and must be based upon the intent of Congress as expressed in the particular legislative history of each such statute and not merely because there exists a similarity of language.

5/ Continued

Tying Act in the initial congressional debates, Senator Bennett made the following comment concerning the precision with which Congress had chosen its language:

> This amendment is the result of 5 or 6 weeks of intensive work by representatives of the Departments of Justice and the Treasury, the Federal Reserve Board, the committee staff, and staff men representing individual Senators on the committee. I know of no language that has been more carefully worked over to accomplish the exact purpose it was intended to accomplish.

116 Cong. Rec. 32,127 (1970) (remarks of Sen. Bennett) (emphasis added).

Another factor counseling against automatic imposition of a direct injury requirement upon plaintiffs under the Bank Tying Act is the complete absence of any legitimate policy justification for doing so. As the lower court acknowledged, the principal policies behind imposing such a requirement in the antitrust context were the difficulty of proof of an "indirect" injury and the potential for multiple liability. Pet. App. at A6. See also, Associated General Contractors, 459 U.S. at 543. As discussed below, neither of these policies are served by denying standing to Petitioner. However, the lower court expressly declined to decide whether these policies were applicable to Petitioner's injury in this case, Pet. App. at A6-A7, ruling instead that the Court's finding that Petitioner's

injury was "indirect" was sufficient to deprive Petitioner of standing. Thus, by mechanically applying standing tests developed under the antitrust statutes, the lower court ruled that Petitioner was unable to maintain an action under the Bank Tying Act despite the absence of any consideration of whether the policies behind adoption of those tests in the context of the antitrust statutes would be served.

A final factor weighing heavily against application of antitrust standing jurisprudence to the Bank Tying Act and similar statutes is the confusion engendered by, and questionable value of, such concepts. As the Court is aware, even in the context of the antitrust statutes, there has been considerable confusion, academic criticism, and

controversy surrounding the technical standing requirements applicable to antitrust plaintiffs.[6/] Petitioner submits that there is no need to extend such controversy to this and a host of other federal statutes based merely on the presence of similar language. As one commentator has recognized,

> [g]iven the decisional morass that presently exists in the antitrust laws over the standing issue, reading

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6/ See, e.g., Note, Diluting Our Antitrust Laws: Federal Standing Analysis Under Section 4 of the Clayton Act, 4 U. Pitt. L. Rev. 241 (Fall 1984); Maurer, Blue Shield of Virginia v. McCready: The Limits of the Antitrust Injury Doctrine, 22 Am. Bus. L.J. 67 (1984); Susman, Standing in Private Antitrust Cases: Where Is The Supreme Court Going?, 52 Antitrust L.J. 465 (1983); Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809 (1977). A detailed summary of the divergence of opinion among the circuit courts as to the status of standing in antitrust cases is provided in Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985).

> the antitrust standing doctrine into the [Bank Tying Act] would serve no salutary purpose. Indeed, this doctrine is antithetical to Congress' intent that Section 1972 is to have broad applicability to bank tying arrangements, since the general antitrust standing requirement restricts the scope of a defendant's liability and a plaintiff's right to recovery.

Naegele, The Anti-Tying Provision: Its Potential Is Still There, 100 Banking L.J. 138, 146 (1983) (footnote omitted).

II.

THE LOWER COURT'S DECISION CONFLICTS IN PRINCIPLE WITH RECENT DECISIONS OF THIS COURT.

In holding that the broad private right of action language contained in Section 1975 of the Bank Tying Act should not be interpreted as written, and that an additional and burdensome "direct injury" standing requirement should be implied, the lower court's

opinion conflicts in principle with at least two recent opinions of this Court. As the district court conceded, Petitioner has standing if "the broad language of the statute means precisely what it says." Pet. App. at E5. Petitioner submits that on at least two separate occasions within the past year, this Court has held that language of the type at issue in this case should be interpreted literally and has rejected as incorrect statutory interpretations that treat the actual statutory language as a mere secondary consideration.

In Board of Governors of the Federal Reserve System v. Dimension Financial Corp., ____ U.S. ____, 54 U.S.L.W. 4101 (U.S. Jan. 22, 1986) ("Dimension"), a case decided this term, this Court held that the definition of "bank" contained in the Bank Holding

Company Act -- the very statute to which the Bank Tying Act was added as an amendment in 1970 -- must be interpreted literally. Rejecting as non-authoritative a statement by one legislator inserted into the Congressional Record, this Court held that such a comment "cannot defeat the plain application of the words actually chosen by Congress to effectuate its will." Id. at 4104. As in this case, the Court in Dimension was faced with an interpretation of statutory language which was not based on its "plain language" but was instead purportedly justified by the lower court's interpretation of the "plain purpose" of the legislation. In rejecting this "plain purpose" argument, the Court reasoned as follows:

> The "plain purpose" of legislation, however, is determined in the first instance with reference to

> the plain language of the statute itself. Richards v. United States, 369 U.S. 1, 9 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. . . . Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Id. at 4105. The Fifth Circuit's decision in this case proceeded not from an analysis of the language actually employed by Congress but from what it erroneously characterized as the "purpose and effect" of the statute at issue. Pet. App. at A5. This method of analysis is precisely the type condemned and discredited by this Court in Dimension with respect to the identical statute involved in this case.

Also conflicting with the Fifth Circuit's analysis in this case is this Court's recent decision involving the private right of action under RICO. Sedima, S.P.R.L. v. IMREX Co., Inc., ____ U.S. ____, 53 U.S.L.W. 5034 (U.S. July 1, 1985) (hereinafter "Sedima"). The private right of action provided in Section 1964(c) of RICO was enacted less than three months prior to, and contains language strikingly similar to that employed in, Section 1975 of the Bank Tying Act.[7/] Like the Bank Tying Act,

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[7/] The private right of action in RICO provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1982).

the private right of action afforded by RICO was intended by Congress as "an aggressive initiative to supplement old remedies." Id. at 5039. The construction placed upon this analogous and contemporaneous provision is thus particularly important and relevant to the issue before this Court.

In Sedima, this Court was confronted, as in this case, with a defendant's attempt to defeat on narrow technical grounds a plaintiff's claim brought under a statute which provided that "any person injured in his business or property" may bring suit. Specifically, the defendant in Sedima argued that for a RICO plaintiff to have standing, the alleged injury must (1) arise out of acts that have been the subject of a criminal conviction, and (2) be of a certain type (a "racketeering type injury"). As in this case, the defen-

dant in Sedima argued that the private right of action had been modeled on Section 4 of the Clayton Act and reasoned that standing should therefore be limited in a similar fashion. Id. at 5035. However, this Court rejected the defendant's first request that a criminal conviction requirement be imposed noting that "[t]he language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word 'conviction' does not appear in any relevant portion of the statute." Id. at 5036. The Court also noted that "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps," id. at 5038, and adopted a liberal construction of this provision because a contrary rule "would severely handicap potential plaintiffs." Id.

The Court also rejected on statutory grounds the defendant's additional claim that a "racketeering injury" requirement could and should be read into the plain language of the statute.

> A reading of the statute belies any such requirement. Section 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962." Section 1962 in turn makes it unlawful for "any person" -- not just mobsters -- to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)-(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

Id. As with the statutory provision at issue in Sedima, the anti-tying provisions of the Bank Tying Act were not added to the Sherman Act, but were instead placed in a separate statute. Id. at 5039. This is an important indication that Congress did not intend the complex and confusing body of antitrust precedent to confound potential plaintiffs. Id. Rejecting in strong terms the position that a competitive injury of some type must be demonstrated by a RICO plaintiff, this Court in Sedima stated that " . . . Congress 'nowhere suggested that actual anti-competitive effect is required for suits under the statute.' . . . The language it chose, allowing recovery to '[a]ny person injured in his business or property,' § 1964(c) . . ., applied to this situation, suggests that the statute is not

so limited." Id. at 5039 n.15 (citations omitted, emphasis in original).

Just as this Court held in Sedima that the language in Section 1964(c) of RICO was clear and did not permit the courts to engraft artificial standing and injury requirements,[8/] the virtually identical language adopted contemporaneously by Congress in the Bank Tying Act should and must be similarly and

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[8/] Further illustrating the importance of the question at issue in this case and the lower courts' need for guidance on such issue, the Eighth Circuit has recently taken the position that an indirectly injured plaintiff under RICO has standing under the virtually identical language of Section 1964(c), see Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 772 F.2d 467, 472-73 (8th Cir. 1985), cert. denied, ____ U.S. ____, 54 U.S.L.W. 3628 (U.S. Mar. 25, 1986), while the Seventh Circuit has held, even after this Court's decision in Sedima, that such a plaintiff does not have standing, see Carter v. Berger, 777 F.2d 1173, 1175 (7th Cir. 1985).

consistently construed. In fact, even a more compelling case can be made for a literal interpretation of the Bank Tying Act since this Court conceded that the private right of action under RICO was "evolving into something quite different from the original conception of its enactors," id. at 5039, whereas, as discussed below, a broad interpretation of the Bank Tying Act is consistent with and furthers congressional intent as to that statute. Both the spirit and holding of this Court's opinion in Sedima compel a construction of Section 1975 of the Bank Tying Act which is as broad as its statutory language.

III.

THE LOWER COURT'S DECISION FRUSTRATES IMPORTANT CONGRESSIONAL POLICY OBJECTIVES.

The Fifth Circuit's indiscriminate transfer to the Bank Tying Act of the

standing requirements that have been implied into Section 4 of the Clayton Act is inconsistent with the legislative history of the Bank Tying Act and overlooks the characteristics that distinguish the Bank Tying Act violation committed by the Banks in this case from the violations of the antitrust laws as to which the standing requirements were developed. If Congress had intended that judicial interpretations of the antitrust laws be incorporated en masse into the Bank Tying Act, then there would have been no need for the presumably redundant anti-tying provisions of the Bank Tying Act. To the contrary, because of the widespread evils caused by tying arrangements, Congress clearly intended to go beyond existing antitrust doctrines and limitations in enacting the private right of action contained in

the Bank Tying Act. It would eviscerate this remedial statute to adopt a restrictive interpretation of standing that left the entity that dealt most directly with the Banks (and thus presumably the least likely to possess adequate resources) as the only party able to bring what is likely to be expensive litigation against financial institutions with vastly superior resources. As one commentator recently noted in rejecting the application to the Bank Tying Act of the restrictions applied to Section 4 of the Clayton Act,

> [t]his type of judicial gloss on section 1975's standing requirement runs counter to congressional intent. Congress intended to encourage private plaintiffs to sue for section 1972 violations. The provision was intended to supplement existing remedies for anticompetitive tying arrangements. The legislative history does not mention any standing requirements other than those expressly stated in

> the statute. Nor does the legislative history indicate that Congress intended courts to interpret section 1972 in the same way in which similarly worded statutes are interpreted. While Congress may have known of the judicial gloss placed on other provisions worded similarly to section 1975, it clearly intended to create a cause of action which was easier to bring than actions under the general antitrust laws and thus free of their restrictive interpretations.

Note, Section 1972: Augmenting the Available Remedies for Plaintiffs Injured by Anticompetitive Bank Conduct, 60 Notre Dame L. Rev. 716-17 (1985) (footnotes omitted).

When Congress enacted the Bank Tying Act, it was specifically aware of Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), and other antitrust precedents involving credit tying arrangements. 116 Cong. Rec. 32,132 (1970) (remarks of Sen.

Bennett). However, Congress enacted the Bank Tying Act because it wished to go beyond restrictions imposed by existing antitrust precedent, see id. (remarks of Sen. Brooke). Congress believed that the anti-tying provisions of the Bank Tying Act were "designed to afford private litigants rights of action based on express or implied tying practices which heretofore involved little likelihood of redress." 116 Cong. Rec. 42,432 (1970) (Statement of Sen. Brooke). In addition, Congress intended "these private rights of action to be a valuable supplement to the enforcement efforts of the U.S. attorneys." 116 Cong. Rec. 31,823 (1970) (remarks of Sen. Sparkman). Contrary to the Fifth Circuit's assumption, the Bank Tying Act was not designed merely to apply the antitrust laws as they then

existed, with minor exceptions, to banks. Indeed, the legislative history confirms that Congress intended to eliminate tying regardless of whether such practices resulted in competitive injury--the sine qua non of an antitrust violation.

> [T]ying arrangements involving a bank are made unlawful by this section without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service. Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved.

Sen. Rep. No. 1084, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5558 (Supplementary Views of Sen. Brooke).

The importance that Congress plainly attached to the private right of action under the Bank Tying Act is

emphasized by its clearly expressed intent to provide a weapon against abusive financial practices that did not exist in the plaintiffs' antitrust arsenal at the time of enactment. This legislative intent is manifestly inconsistent with the imposition of narrow and technical restrictions upon the private right of action contained in the Bank Tying Act. The standing restrictions implied into the statute by the lower court would have the effect of codifying what Congress thought it was rejecting and rendering ineffectual the "valuable supplement" that Congress sought to provide.

IV.

THE LOWER COURT'S DECISION FAILS TO TAKE INTO ACCOUNT IMPORTANT EXCEPTIONS TO THE "DIRECT INJURY" REQUIREMENT RECOGNIZED BY THIS COURT.

Even if it is assumed, arguendo, that the standing doctrines applicable

to antitrust cases are applicable to the Bank Tying Act, the lower court incorrectly applied such doctrines to the facts of this case. Even in antitrust cases, the requirement that a plaintiff demonstrate a "direct" injury is not absolute. In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) (hereinafter "Hanover Shoe"), this Court rejected a defendant's attempt to assert a "passing-on" defense in an antitrust action. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (hereinafter "Illinois Brick"), this Court extended this same analysis to plaintiffs by barring antitrust actions by indirect purchasers against alleged price-fixers. However, in fashioning these rules, the Court was careful to emphasize "that there might be situations -- for instance, when an

overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged -- where the considerations requiring that the passing-on defense not be permitted in this case would not be present." Hanover Shoe, 392 U.S. at 494. Thus, in the years since Hanover Shoe and Illinois Brick, the lower courts and commentators have repeatedly observed that situations involving the "functional equivalent" of a cost-plus contract fall within a classic exception to the "direct injury" requirement created by this Court. See, e.g., In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1163-65 (5th Cir. 1979), cert denied 449 U.S. 905 (1980); Note, Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages, 55 Tex. L. Rev. 1445, 1454-57 (1978).

Petitioner submits that to the extent that antitrust standing analysis is applicable to the instant case, the exceptions recognized by this Court to the prohibition of suits by indirectly injured persons are also applicable. This Court found in Illinois Brick that a "cost-plus" contract represented an exception to the rule against suits by indirect purchasers in the antitrust context because the presence of such a contract meant that the effect of the violation in question (i.e., price fixing) was passed on to more remote parties in a fashion where "[u]ncertainties of proof are thus avoided." In re Beef Industry Antitrust Litigation, 600 F.2d at 1163. The violations alleged in this case consist of abusive credit practices rather than price fixing. Because the Banks knew at the time they

committed such practices that Lexco was insolvent, that Lexco was drilling the Tuscaloosa Wells, and that Lexco had conveyed interests in the wells to other entities such as Petitioner, the effect of such unlawful credit practices was automatically and mechanically transferred to the Tiger Trust and other co-owners of working interests in the wells because Louisiana law authorized suppliers of materials and services to Lexco to file mechanic's and materialmen's liens against not only Lexco's interest in the Tuscaloosa Wells but also against the interests of the other owners. See Pet. App. at A7. To the extent such liens are ultimately paid out of the proceeds of production attributable to the Tiger Trust's interest, such injury is both easily ascertainable and distinct from the injury suffered by

Lexco. The Tiger Trust's injury is clearly not subject to the complicated issues surrounding proof of an indirect market injury which caused this Court to limit such suits in the antitrust context. Accordingly, because an exception to the "direct injury" antitrust standing requirement is applicable, the lower court erred in not permitting Petitioner's action to proceed.

CONCLUSION

For the reasons set forth above, Petitioner submits that a writ of certiorari should issue and be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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April 11, 1986

85-1670

Supreme Court, U.S.
FILED
APR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-.....

IN THE

Supreme Court of the United States

October Term, 1985

RHETT G. CAMPBELL, TRUSTEE,

Petitioner,

v.

WELLS FARGO BANK, N.A.,
FIRST SECURITY BANK OF UTAH, N.A.,
FIRST SECURITY LEASING/VALLEY PARTNERSHIP NO. 1,
a General Partnership, and
FIRST SECURITY/VALLEY PARTNERSHIP NO. 1,
a General Partnership,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RHETT G. CAMPBELL, TRUSTEE,
Plaintiff-Appellant,

JOSEPH C. CANIZARO,
Plaintiff-Intervenor/
Appellant,

v.

WELLS FARGO BANK, N.A., FIRST SECURITY BANK OF UTAH, N.A., FIRST SECURITY LEASING/VALLEY PARTNERSHIP NO. 1, AND FIRST SECURITY/VALLEY PARTNERSHIP NO. 1,
Defendants-Appellees.

No. 85-4146

OPINION

Filed January 28, 1986

Before: Thomas Gibbs Gee and Sam D. Johnson, Circuit Judges, and Joe J. Fisher,* District Judge.

Opinion by Judge Thomas Gibbs Gee

Appeal from the United States District Court
for the Western District of Louisiana
Tom Stagg, Chief Judge, Presiding

SUMMARY

Banking and Finance/Antitrust

Appeal of a district court order granting summary judgment for the defendants in an action under the Bank Tying Act, 12 U.S.C. Sec. 1971, et seq. Affirmed.

*District Judge of the Eastern District of Texas, sitting by designation.

Appellants advanced funds to an exploration company so it could drill wells and earn oil leasehold rights under its contract with an oil company. Appellants were to receive a working interest in the exploration company's rights. The exploration company was short of money, and was repeatedly forced to draw upon credit from several banks, and was finally forced into bankruptcy. Appellants brought this action against the banks, contending that they were injured by the banks' intrusions into the exploration company's operations, intrusions they contend drove the exploration company out of business and resulted in appellant's interests being encumbered with liens. The district court granted defendants' motions to dismiss on grounds that since appellants had no direct relationship with the bank, they lacked standing to sue under Sec. 1975.

[1] The district court erred in holding that non-customers lack standing per se to bring an action under Sec. 1975.

[2] The purpose of the Bank Tying Act is to apply the general principles of the Sherman Antitrust Act to the field of commercial banking, so reference to antitrust statutes and decisions is most pertinent in view of the substantial similarity of the acts. [3] Under the antitrust act, a plaintiff must demonstrate that his injury was a direct consequence of the alleged antitrust violation, that the extent of his injury is determinable and not speculative, and that recovery by him will not duplicate potential recovery by other plaintiffs. [4] Applying these antitrust principles to the claims at issue, it is concluded that appellants' injuries are not a direct consequence of the alleged activities of the defendants. Appellants were damaged by the exploration company's inability to meet its obligations, not by defendants' activities.

OPINION

THOMAS GIBBS GEE, Circuit Judge:

Latham Exploration Company ("LEXCO") was organized under the laws of Louisiana in 1980 for conducting exploratory drilling operations. In 1982, LEXCO entered into a farm-out agreement with Chevron on certain Chevron leases in Pointe Coupee Parish,

Louisiana. Under this arrangement, LEXCO was to drill five wells and earn certain leasehold rights. LEXCO then contracted with the plaintiffs to advance funds and equipment for the five wells in return for the assignment of a certain working interest in LEXCO's leasehold rights.

Throughout this time, LEXCO was suffering severe cash-flow problems and was repeatedly forced to draw upon credit with the defendant banks. At last, LEXCO was overwhelmed by these financial pressures, filing for bankruptcy under Chapter 11 of the Federal Bankruptcy Code in the Western District of Louisiana.

Joseph Canizaro and Rhett G. Campbell brought this action in the district court against the multiple defendant banks ("Banks") seeking damages and other relief under the Bank Tying Act, 12 U.S.C. § 1971, et. seq. The plaintiffs claimed that they were injured by the Banks' intrusions into LEXCO's operations. The Banks, it is alleged, imposed increasingly onerous conditions upon LEXCO for credit extensions, forcing LEXCO to curtail the Point Coupee operations. This cessation of activity at the well sites resulted in the plaintiffs' interests being encumbered with liens imposed by Louisiana law for LEXCO's creditors.

The district court granted the defendants' motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the plaintiffs' Tying Act claims on the ground that since the plaintiffs had no direct relationship with the banks, contractual or otherwise, they lacked standing to sue under § 1975 of the Tying Act. The plaintiffs now appeal.

I. STANDING PER SE UNDER § 1975

12 U.S.C. § 1975 provides, in pertinent part, that: "Any person who is injured in his business or property by reason of anything forbidden in § 1972 of this title may sue therefor in any district court of the United States. . ."

The plaintiffs argue vigorously that the district court erred in holding that non-customers of the bank have no standing *per se* under § 1975. Noting the use of the word "customer" in § 1972,[1]

[1] § 1972 provides, in pertinent part:

(1) A bank shall not in any manner extend credit, lease, or sell prop-

and the use of the broader term "person" in §1975, the plaintiffs cite the general rule that "where Congress has carefully employed a term in one place but excluded it in another, it should be excluded." *J. Ray McDermott and Co., Inc. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir. 1972). This rule of exclusion, however, is only an aid to statutory construction, not a rule of law. The controlling consideration is legislative intent, and the maxim can be overcome by a strong indication of contrary congressional intent. *United States Dept. of Justice v. F.L.R.B.*, 727 F.2d 481, 491 (5th Cir. 1984).

The district court noted that only two reported decisions have addressed the issue of standing under the Act: *Swerdloff v. Miami National Bank*, 584 F.2d 54 (5th Cir. 1978) and *Coaster v. Blount National Bank*, 578 F.2d 1192 (6th Cir. 1972). The parties agree that these cases both hold, in effect, that plaintiffs who deal directly with a bank possess standing to sue for violations of § 1972. Neither case, however, speaks to whether non-customers lack standing *per se* under § 1975.

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erty of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement:

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to a bank holding company of such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service.

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any subsidiary of such bank holding company; or,

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

[1] Scouring the admittedly sparse legislative history of the Tying Act, we find no evidence that Congress intended for bank customers alone to have standing under § 1975. It may very well be that, under general principles of standing, most non-customer injuries will be too remote to furnish a basis for recovery under the act. That is, however, entirely different from a blanket holding that non-customers have no standing under § 1975 as a matter of law. We therefore conclude that the district court erred in holding that non-customers lack standing *per se* under § 1975.

II. STANDING UNDER THE COMMON LAW

Even though the district court erred in holding that the appellants lacked standing *per se* to pursue their Tying Act claims, we must still consider its apparent alternate basis for the dismissal: that the plaintiffs' injuries were too remote under general principles of standing. The court observed that in the absence of any direct contractual relationship with the Banks, the plaintiffs' injuries were "derived from the adversity suffered by LEXCO, and that the economic nexus between the Banks' activity and the harm to plaintiffs is remote in comparison with the harm suffered by the consumer plaintiff in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540 (1982)."

A 12(b)(6) motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The district court was, and we are, required to accept as true all well pleaded facts in the complaint; and the complaint is to be liberally construed in favor of the plaintiff. *Abdul Alim Amin v. Universal Life Insurance Co. of Memphis*, 760 F.2d 638, 640 (5th Cir. 1983). It is not, however, necessary or proper to assume that the plaintiffs can prove facts that they have not alleged or that the defendants violated the Bank Tying Act in ways that have not been alleged. *Assoc. General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 526, 102 S.Ct. 897, 910, 74 L.Ed.2d 723 (1983).

[2] The purpose and effect of § 1972 is to apply the general principles of the Sherman Antitrust Act to the field of commercial banking, without requiring plaintiffs to establish either the economic power of a bank or the specific anticompetitive effects of tying

arrangements. *Parsons Steel v. First Alabama Bank of Montgomery*, 679 F.2d 242, 245 (11th Cir. 1982). In construing the Tying Act, then, reference to antitrust statutes and decisions is "most pertinent in view of the substantial similarity of the Acts." *Swerdloff v. Miami National Bank*, 584 F.2d 54, 58-59 (5th Cir. 1978).

The class of persons entitled to maintain a private damage action under the antitrust laws is defined in § 4 of the Clayton Act, 15 U.S.C. § 15. It provides, in language all but identical to that before us today, that "Any *person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any district court of the United States. . ." (emphasis added).

The Supreme Court recently remarked that "A literal reading of [§ 4 of the Clayton Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Associated General Contractors of California, supra*, 459 U.S. at 529. However, "an antitrust violation may be expected to cause ripples of harm through the nation's economy, but despite the broad wording of § 4, there is a point at which the wrongdoer should not be held liable.' " *Id.* 459 U.S. at 534, quoting *Illinois Brick Co. v. Illinois*, 431 U.S. at 760. Therefore, whether the plaintiffs "may recover for the injury [they] allegedly suffered by reason of the defendants' coercion against third parties cannot be answered simply by reference to the broad language of § 4. Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiffs' harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* 459 U.S. at 535.

[3] Thus, in order to have standing to recover under § 4 of the Clayton Act, an antitrust plaintiff must demonstrate that his injury was a direct consequence of the alleged antitrust violation, that the extent of his injury is determinable and not speculative, and that recovery by him will not duplicate potential recovery by other plaintiffs. *Walker v. U-Haul of Mississippi*, 747 F.2d 1011, 1014 (5th Cir. 1984).

[4] Applying the foregoing antitrust principles to the claims at bar, we conclude that there is no need to decide whether the plaintiffs' injuries are determinable and whether recovery for them

would be duplicative, since the injuries claimed are not a direct consequence of the alleged activities of the defendants.The plaintiffs assert that the illegal tying activities of the defendants forced LEXCO into bankruptcy and that this, in turn, required LEXCO to cease its drilling operations. The cessation of drilling operations resulted in creditors of LEXCO imposing liens on the wells—liens which necessarily encumbered the working interests of the plaintiffs. In short, the plaintiffs were damaged by LEXCO's inability to meet its obligations. Even assuming that the plaintiffs' allegations are true and the defendants' illegal activities resulted in LEXCO's demise, we hold that the plaintiffs' injuries were not a direct consequence of the defendants' activities. Accordingly, the district court's dismissal is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85 4146

RHETT G. CAMPBELL, Trustee,

Plaintiff-Appellant,

JOSEPH C. CANIZARO,

Intervenor-Appellant,

versus

WELLS FARGO BANK, N.A., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 28, 5 Cir., 1986, _____ F.2d _____)
(February 28, 1986)

Before GEE and JOHNSON, Circuit Judges, and FISHER*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

S/ Thomas Gibbs Gee
United States Circuit Judge

*District Judge of the Eastern District of Texas, Sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-9002
(USDC # CA-84-0933)

RHETT G. CAMPBELL, TRUSTEE,

Plaintiff-Petitioner,

versus

WELLS FARGO BANK, N.A.,
FIRST SECURITY BANK OF UTAH, N.A.,
FIRST SECURITY LEASING/VALLEY
PARTNERSHIP, No. 1, ETC., ET AL.,

Defendants-Respondents.

Petition for Leave to Appeal From an Interlocutory Order of the United States District Court for the Western District of Louisiana

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Before RUBIN, RANDALL, and TATE, Circuit Judges

BY THE COURT:

IT IS ORDERED that the application of Rhett G. Campbell for leave to appeal from an interlocutory order of the

United States District Court for the Western District of Louisiana, entered on 3 October 1984 and certified on 28 December 1984 is GRANTED.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RHETT G. CAMPBELL

Versus CIVIL ACTION NO.
84-0933

WELLS FARGO, INC., et al

MEMORANDUM RULING

Some cases, it seems, follow an orderly and straight-forward path from filing to final resolution. Others, are destined from their inception to take a more tortuous course. This matter had its origin in the Chapter 11 proceedings captioned In re: Latham Exploration Company, Inc. Debtor, Bankruptcy No. 583-01408-S. The present suit involves a dispute between a secured creditor of Latham Exploration Company (LEXCO) and several banks from whom LEXCO received

loans. The plaintiff, Rhett G. Campbell, is trustee of the creditors trust established under a Chapter 11 plan of reorganization in In re: Edward Mike Davis, d/b/a Tiger Oil Company, Case No. 80-00940-HB, and In re: Tiger Drilling Company, Inc., Case No. 80-00941-HB, United States Bankruptcy Court for the Southern District of Texas, Houston Division. Campbell sues in his capacity of trustee of the creditors trust, which is a creditor of Latham Exploration Company, Inc. The defendants are Wells Fargo Bank, N.A. (WFB), First Security Bank of Utah, N.A. (FSB), First Security Leasing/Valley Partnership No. 1 (FSLV) and First Security/Valley Partnership No. 1 (FSV).

LEXCO is a wholly owned subsidiary of Latham Resources Corporation. The latter corporation is engaged in the oil

and gas contract drilling business under the direction of James A. Latham. LEXCO was organized in 1980 for the purpose of conducting exploratory drilling operations and engaging in the same activity as general partner for a series of limited partnerships. In conjunction with this business activity, LEXCO obtained loans from the defendants beginning in the fall of 1981. Through a continuous, complex series of arrangements, LEXCO continued to receive credit and additional financing from the banks until the middle of 1983. As an industry wide recession began to affect the contract drilling business, Latham attempted to shift the emphasis of Latham Resources' business into exploration, using LEXCO as an instrument to raise drilling dollars. As the recession worsened and LEXCO's need for additional working cap-

ital rose, the banks began to impose conditions upon the extension of credit which the complaint alleges were not "usual or ordinary banking practice[s]".

In order to promote its goal of pursuing exploration and production, LEXCO entered into a farm out agreement with Chevron USA, Inc. in May of 1982. The agreement provided by LEXCO could earn leasehold rights in certain Chevron leases by drilling five wells in Pointe Coupee Parish, Louisiana. Subsequent to entering the farmout agreement, LEXCO entered into agreements with other parties including Tiger Oil Company and Tiger Drilling Company which provided that Tiger Oil, Tiger Drilling and others would advance funds, equipment and services for drilling operations under the farmout agreement in exchange for acquisition of "working interest" in

the leasehold rights LEXCO anticipated earning under the Chevron farmout. As trustee of the Tiger Oil and Tiger Drilling Creditors' Trust, plaintiff has succeeded to the Tiger Companies' interest in these agreements.

Faced with mounting indebtedness and business reversals, LEXCO filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on October 17, 1983 in the United States Bankruptcy Court for the Western District of Louisiana, Case No. 583-01408-S.

Contending that LEXCO's creditors were adversely affected by the bank's alleged intrusion into LEXCO's operations as a condition for the extension of credit, plaintiff brought the instant suit. Specifically, plaintiff sues to recover damages under the Bank Tying Act, for revocation of the collateral mortgages and security interest of the

banks under the Louisiana revocatory action, and to have the claims of the banks equitably subordinated under 11 U.S.C. § 510(c). In response to the complaint, defendants have filed a motion to dismiss. Plaintiff has countered this motion to dismiss by seeking to amend the complaint. In addition, there is also pending a motion to intervene filed on behalf of Joseph Canizaro, another creditor of LEXCO.

The original complaint, filed on April 9, 1984, contained eight "counts". Specifically, the precise relief demanded in each count is a follows:

(1) Count 1 - Preference Action (11 U.S.C. § 547)

(2) Count 2 - Preference Action, Insiders (11 U.S.C. § 547)

(3) Count 3 - Preferences to be recovered from immediate transferee (11 U.S.C. § 547)

(4) Count 4 - Fraudulent conveyances (11 U.S.C. § 548)

(5) Count 5 - Avoidable assignments (11 U.S.C. § 544)

(6) Count 6 - Equitable subordination (11 U.S.C. § 510)

(7) Count 7 - Louisiana revocatory action

(8) Count 8 - Bank Tying Act (12 U.S.C. § 1972(1))

Defendant's motion to dismiss the complaint is founded upon the assertions that the only proper plaintiff to bring this action is the trustee in the Latham Exploration bankruptcy. Three days after the instant complaint was filed, the trustee in the Latham bankruptcy, William C. Sandoz, filed a complaint with the bankruptcy court alleging almost identical facts and asking for the same relief demanded in the eight counts in this matter. Of course, Sandoz sought to bring bankruptcy action on behalf of the estate of Latham Exploration, rather than for the benefit of

specific creditors as in this case. In response to the Sandoz complaint, Rhett Campbell filed a motion to amend the complaint in this matter. The amended complaint deletes the first five counts of the original complaint but seeks to assert the remaining three. The court concludes that the motion to amend should be granted. Under Rule 15 amendments should be liberally allowed, especially when plaintiff voluntarily deletes claims on which he cannot succeed.

After plaintiff moved to amend the complaint, defendant reurged their motion to dismiss the remaining counts in the amended complaint.

In urging the court to dismiss the claim under the Bank Tying Act, 12 U.S.C. § 1972, defendants contend that plaintiff lacks standing to sue. Section 1972 provides in pertinent part:

A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement:

(A) That the customer shall obtain some credit, property, or service from such banks other than a loan, discount, deposit, or trust service;

(B) That the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) If the customer provides some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) That the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

> (E) The customer shall not obtain some other credit, property, or service from a creditor of such bank, bank holding company of such bank, or any other subsidiary of such bank holding company, other than a conditional requirement that the bank shall reasonably impose any credit transaction to assure the soundness of the credit.

Plaintiff found his right to pursue this claim upon 12 U.S.C. § 1975, which states:

> Any person who is injured in his business or property by reason of anything forbidden in § 1972 of this title may sue therefor in any district court of the United States . . . .

Defendants contend that creditors of a bank customer lack standing to assert a claim for damages under the Bank Tying Act. Defendants rely primarily upon two circuit court decisions: Costner v. Blount National Bank, 578 F.2d 1192, (6th Cir. 1978) and Swerdloff

v. Miami National Bank, 584 F.2d 54 (5th Cir. 1978). Indeed, if other cases exist which address the issue of standing on a Tying Act claim, the court's own research has not revealed them. In Costner, supra, plaintiff sued the bank alleging violations of the Bank Tying Act and the Sherman Act. Plaintiff Costner was the owner of 50 percent of the stock in an automobile dealership. He obtained a substantial personal loan from the defendant to buy the remaining stock in the company. As security, Costner pledged all of the stock to the bank. The loan was conditioned upon several factors which affected the operation of the business. Specifically, the bank required the corporation to sell a large share of its retail commercial automobile installment paper to the bank and also required that the corpora-

tion employ a person designated by the bank to enforce compliance with the tying arrangement. The bank contested Costner's standing to pursue claim under the Tying Act. The district court charged the jury that "the injury to the stockholder must be direct and not merely consequential or derivative through the corporation." Id. at 1195. On appeal, the United States Court of Appeals for the Sixth Circuit held:

> The belief is sufficient evidence to justify a finding that plaintiff, as distinct from the automobile dealership, suffered direct damage as the result of the illegal tying arrangement.

Id. at 1195.

In Swerdloff, supra, two shareholders owning 100 percent of a corporation guaranteed a loan made by the defendant bank to their corporation. The court found the issue as whether the

shareholders had "standing to bring suit against the bank under a federal law which protects bank customers from being required as a loan condition to provide additional credit, property, or service to the bank not usually required of other customers." 584 F.2d at 57. The factual background of Swerdloff revealed that the stockholders were required personally to guarantee loans made to the corporation. The bank then indicated to the guarantors that it would terminate the corporation's credit arrangement unless 51 percent of the capital stock was transferred to Arrow Paper & Chemical Company, Inc. which was another bank customer. When the Swerdloffs refused to comply with the bank's condition, the bank terminated the financing arrangement with the corporation. The corporation was

ultimately placed in involuntary bankruptcy. The individual shareholders then commenced an action under the Bank Tying Act. The district court granted the bank's motion to dismiss on the ground that the corporation, rather than the stockholders, was the bank's customer, thus depriving the stockholders of standing to sue under § 1972. The United States Court of Appeals for the Fifth Circuit reversed, holding that the Swerdloffs had standing to sue because they were "customers" of the bank. By becoming guarantors of a loan made to a bank's customer, the court held that the Act applied because there had been "a direct relationship between the bank and purported customer, as well as privity of contract with the bank . . ." Id. at 59. The opinion specifically refused to reach the issue of whether "the plaintiffs, as stockholders, would have

standing to bring suit under § 1975 where the corporation the only single 'customer' protected by the statute." Id. at 60. In response to the bank's argument that the Swerdloffs' claim created a duplicative cause of action, the court explained that the shareholders were asserting their own cause of action and no part of the corporation since both the corporation and the shareholder enjoyed a "customer" relationship with the bank. It is defendant's contention that Costner and Swerdloff require plaintiff to have a direct contractual relationship with a defendant bank; a relationship which purportedly does not exist in this case. It is worth noting that in the scant number of cases which address liability under the Act, the plaintiff has been either a customer of the bank, as that term is normally

viewed, or has engaged in a direct contractual relationship with the bank for the benefit of a customer, see, e.g., Parsons Steel v. First Alabama Bank of Montgomery, 679 F.2d 242 (11th Cir. 1982); B.C. Recreational Industries v. First National Bank of Boston, 639 F.2d 828 (1st Cir. 1981); McCoy v. Franklin Savings Association, 636 F.2d 172 (7th Cir. 1980); Duryea v. Third Northwestern National Bank, 606 F.2d 823 (8th Cir. 1979); Costner, supra; Swerdloff, supra.

Not surprisingly, plaintiff construes Costner and Swerdloff as decisions creating an independent right of action for an aggrieved party regardless of their status as customers of the bank. Furthermore, plaintiff maintains that decisions construing the Clayton Act broadly are particularly germane in

this case. In particular, plaintiff relies upon Reiter v. Sonotone Corporation, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed. 2d 931 (1979) and Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540 (1982). It is true that the purpose of § 1972 is to make the principles underlying the Sherman Antitrust Act applicable to the field of banking, Parsons Steel, supra, at 245. Generally, cases construing the effect of the principles of the antitrust laws are persuasive in determining the effect to be given the Tying Act, see, Swerdloff, supra, at 58-59. It is also true that the language of § 4 of the Clayton Act is almost identical to the language contained in § 1975, as plaintiff argues. Plaintiff is correct in stating that the Supreme Court in both Reiter and McCready refused to apply a restrictive

construction to the Clayton Act in deciding whether plaintiffs could properly bring an action under that Act. However, in both Reiter and McCready, the Court found that consumers who were directly responsible for bearing the economic burden of anti-competitive practices were entitled to maintain actions under the Clayton Act. In McCready, the Court explained the kind of analysis required to determine the type of case in which the alleged injuries are too remote to justify plaintiff's standing to sue for damages under § 4. The McCready test provides that the court must examine:

> The physical and economic nexus between the alleged violation and the harm to the plaintiff, and . . . the relationship of the injury alleged with those forms of injuries about which Congress was likely to have been concerned in making defendant's conduct unlawful and

> in providing a remedy under § 4.

102 S.Ct. at 2548. The same analysis is helpful in determining whether a bank customer's creditor has standing to sue under § 1975. At the outset, one crucial fact cannot be ignored: plaintiff has not alleged any direct contractual relationship between the Tiger Trust and the banks. Instead, plaintiff alleges that the unlawful tying arrangements imposed by the banks upon LEXCO have resulted in LEXCO's economic downfall. In short, the harm suffered by plaintiff is really derived from the adversity suffered by LEXCO. Thus, the economic nexus between the banks' activity and the harm to plaintiff is remote in comparison with the harm suffered by the consumer plaintiff in McCready. Moreover, this case can be easily distinguished from Swerdloff and Costner. In both of

those cases, the aggrieved parties, although not customers in the ordinary sense of that term, suffered harm as the result of the bank's tying arrangements because of conditions imposed upon their agreements with the banks. Here, the banks imposed no conditions whatsoever upon the Tiger Trust. To conclude that the creditor of a bank customer has standing under § 1975 would require the court to extend that statute's applicability beyond the scope which it has thus far been given by the majority of courts which have had an opportunity to consider this issue, Parsons Steel v. First Alabama Bank of Montgomery, 679 F.2d 242 (11th Cir. 1982); B. C. Recreational Industries v. First National Bank of Boston, 639 F.2d 828 (1st Cir. 1981); McCoy v. Franklin Savings Assn., 636 F.2d 172 (7th Cir. 1980); Duryea v.

Third Northwestern National Bank, 606 F.2d 823 (8th Cir. 1979); Costner v. Blount National Bank, 578 F.2d 1192 (5th Cir. 1978); Swerdloff v. Miami National Bank, 584 F.2d 54 (5th Cir. 1978).

To determine what form of injury Congress sought to prohibit in allowing a private remedy under § 1975, the court is convinced that the analysis in Swerdloff is correct. Section 1975 is designed to prevent abusive trade restrictions by banks seeking to exert their power through the extension of credit. From the facts in the record, it is apparent that the defendants never extended credit directly to the Tiger Companies, nor did the banks require the Tiger Companies to guarantee any of LEXCO's loans. Even given the broad definition given to the term "customer" by the Swerdloff court, there are simply no

facts which have been alleged which would allow the court to conclude that the Tiger Trusts were "customers" of the banks. In enacting § 1975, Congress clearly expressed concern over the effect of bank tying arrangements on bank customers. Although § 1975 allows "any person" aggrieved to maintain an action, § 1975 cannot be read independently and apart from § 1972. Section addresses itself solely to unlawful actions taken by a bank in relation to that bank's customer. Since the Tiger Trusts are not customers of the banks, § 1972 affords them no remedy. Even assuming that the allegations in the complaint are true, if the bank has engaged in unlawful tying arrangements, the remedy in this case belongs to the bank's customer, LEXCO. As noted above, the trustee in the LEXCO bankruptcy has

asserted this claim against the banks. Should LEXCO's trustee succeed in proving this claim, the damages will obviously inured (sic) to the benefit of LEXCO's creditors in the bankruptcy action. Moreover, to allow both LEXCO and its creditors to pursue claims against the bank increase the possibility that the banks could be exposed to "duplicative recoveries." See, Illinois Brick Company v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed. 2d 707 (1977). Consequently, the court holds that LEXCO's creditors lack standing to sue under 12 U.S.C. § 1975 and that the motion to dismiss the Bank Tying Act claim will be GRANTED.

Defendants have moved to dismiss plaintiff's claim alleging his right to recover the Louisiana revocatory action. In essence, defendants contend that the

only proper plaintiff after a bankruptcy case has begun is the trustee. Standing alone, this statement is correct, see Glenny v. Langdon, 98 U.S. 20 (1878); Miller v. New Orleans Acid & Fertilizer Company, 29 S.Ct. 176 (1908). From this principle, defendants argue that dismissal is appropriate. Such is not the case. Neither party to this action has argued the effect of 11 U.S.C. § 362 upon the disposition of this matter. Giving the allegations in the complaint a liberal interpretation, it is apparent that plaintiff seeks to revoke security interest of the defendants over LEXCO's property which is now the property of the bankruptcy estate. A voluntary petition for reorganization under § 301 of the Bankruptcy Code operates as a stay of "any act to obtain possession of property of the estate or of property

from the estate . . .", 11 U.S.C. § 362. In In re Mortgageamerica Corp., 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit, citing Glenny, supra, held that an action under the Texas Fraudulent Transfers Act was stayed pending resolution of a Chapter 11 proceeding as a result of the effect of § 362. Although the statutory basis for plaintiff's action in this case differs from that in Mortgageamerica, the same policy consideration exists. The trustee has filed a complaint in the bankruptcy court which seeks the same relief as that alleged in this case. Thus, the creditors' rights will be protected without requiring defendants' to respond in two separate proceedings. Accordingly, plaintiff's claim for relief under Louisiana Civil Code Articles 1970 thru 1994 will be

stayed pending resolution of the Chapter 11 proceeding.

The same result obtains as to plaintiff's claim for equitable subordination under 11 U.S.C. § 510(c). There is no need to decide whether or not a creditor can be a proper party plaintiff under § 510(c) since the better course is to allow the trustee to pursue this claim in bankruptcy. Distilled to its essence, plaintiff's claim for equitable subordination will affect the manner in which the property of the estate is ultimately apportioned. Under the circumstances, the provisions of § 362 require that a stay be issued. Thus, plaintiff's claim for equitable subordination under 11 U.S.C. § 510(c) will be STAYED pending completion of the same claim in the Chapter 11 proceeding.

Finally, one of LEXCO's debtors, Joseph Canizaro, has filed a motion to intervene. As a creditor of LEXCO, Canizaro obviously has a valid interest in the ultimate disposition of the remaining two claims asserted by plaintiff. For this reason, the motion to intervene will be GRANTED, subject to the stay in effect as a result of this Ruling.

In conclusion, defendants have also asked for an award of attorneys' fees under 28 U.S.C. § 1927, which provides:

> Any attorney or other persons admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess cost, expenses, and attorneys' fees reasonably incurred because of such conduct.

Nothing in the record of this case convinces the court that plaintiff has

attempted to complicate the proceedings for the express purpose of behaving unreasonably or vexatiously. Consequently, defendants' motion for attorneys' fees under § 1927 will be DENIED.

An Order consistent with the terms of this ruling shall issue herewith.

THUS DONE AND SIGNED in Shreveport, Louisiana, this the 2nd day of October, 1984.

S/
Tom Stagg,
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RHETT G. CAMPBELL

Versus CIVIL ACTION NO.
84-0933

WELLS FARGO, INC., et al.

MEMORANDUM RULING

On October 3, 1984, the court issued an Order dismissing plaintiff's claim under the Bank Tying Act. Plaintiff now asks the court to reconsider its earlier ruling. In the alternative, plaintiff asks the court to issue a final judgment on the Tying Act claim or to certify the question for appeal under 28 U.S.C. § 1292.

After reviewing the contentions raised in plaintiff's motion, and the defendants' opposition, the court is

convinced that its earlier ruling is correct and that no further discussion is required.

In deciding whether a question should be certified for immediate appeal under 28 U.S.C. § 1292(b), the jurisprudence in this circuit makes it clear that the district court must evaluate the factors in § 1292(b) and state the controlling question of law involved. Clark-Dietz & Associates-Engineers v. Basic Construction Co., 702 F.2d 67 (5th Cir. 1983). The statute provides:

> When a district judge, making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of appeals may thereupon, in

> its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of the order . . . .

28 U.S.C. 1292(b). At the outset, it is worth noting that resolution of the issue of standing under Bank Tying Act does not require an extensive factual determination. Most, if not all, of the pertinent facts have already been provided to the court. Any additional facts relevant to resolution of this claim can be provided by affidavit or documentary evidence. No evidentiary hearing is required since the relevant facts surrounding this claim do not turn upon questions of credibility.

The controlling question of law here is very narrow. Specifically, the crucial issue is whether a person, allegedly injured by an unlawful tying arrangement, has standing to sue under

the Bank Tying Act when he is not a customer of the bank or has no direct contractual relationship with the bank. Section 1292 also requires the court to determine that there is "substantial ground for difference of opinion" concerning resolution of this issue. As noted in the court's October 3 Memorandum Ruling, there are no cases which deal with the precise issue presented in this case. Instead, plaintiff asks the court to infer a right of action based upon the holdings of the Fifth and Sixth Circuits in Costner v. Blount National Bank, 578 F.2d 1192 (6th Cir. 1978) and Swerdloff v. Miami National Bank, 584 F.2d 54 (5th Cir. 1978). Although this judge concluded that those two cases require that the Bank Tying Act be limited in its application to noncustomers enjoying a direct contractual relationship

with a bank, another court could conclude, as suggested by plaintiff, that the broad language of the statute means precisely what is says. Consequently, in the absence of direct controlling authority, room for a difference of opinion does exist.

Finally, § 1292 requires the district court to explain how an immediate appeal will advance "the ultimate termination of the litigation. . . ." In its Memorandum Ruling and Order of October 3, 1984, the court dismissed the Bank Tying Act claim but stayed disposition of the remaining two claims pending the outcome of the trustee's suit against the banks for the same claims presented in this suit. If no appeal is allowed by this court on Campbell's Bank Tying Act claim, the entire case will remain in abeyance until conclusion of

the trustee's action. Should Campbell be required to postpone his appeal of the Tying Act claim until conclusion of the trustee's action, it is possible that the banks will be required to defend the same suit twice. If the court of appeals concludes that this court erred in dismissing Campbell's claim, Campbell must then be allowed to proceed with those claims after almost identical proceedings have been conducted in the trustee's action against the banks. If, on the other hand, an immediate appeal is allowed and this court is reversed, the actions brought by Campbell and the trustee can be consolidated, thus conserving the resources of both counsel and the court. Accordingly, Campbell's motion for immediate appeal under 28 U.S.C. § 1292 must be GRANTED.

The disposition of this matter under § 1292 obviates the necessity of issuing a final judgment under Rule 54. An Order consistent with the terms of this Ruling shall issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 28th day of December, 1984.

S/
TOM STAGG, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RHETT G. CAMPBELL

Versus CIVIL ACTION NO.
84-0933

WELLS FARGO, INC., et al.

O R D E R

Based upon the reasons expressed in the foregoing Memorandum Ruling and upon the court's conclusion that an appeal will materially advance the ultimate termination of the litigation,

IT IS ORDERED that plaintiff's motion for immediate appeal under 28 U.S.C. § 1292 is GRANTED.

IT IS FURTHER ORDERED that the motion for reconsideration is DENIED.

DATED AND SIGNED at Shreveport, Louisiana, this 28th day of December, 1984.

S/
TOM STAGG, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

IN RE:	§	
	§	
LATHAM EXPLORATION COMPANY, INC.,	§	CASE NO. 583-01408-S (Chapter 11)
	§	
Debtor.	§	
	§	
RHETT G. CAMPBELL, TRUSTEE,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	
v.	§	CV-84-0933
	§	
WELLS FARGO BANK, N.A., FIRST SECURITY BANK OF UTAH, N.A., FIRST SECURITY LEASING/ VALLEY PARTNERSHIP NO. 1, a General Partnership, and FIRST SECURITY/ VALLEY PARTNERSHIP NO. 1, a General Partnership,	§	**JURY TRIAL DEMANDED**
	§	
Defendants.	§	

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

COMES NOW Rhett G. Campbell, Trustee of the Tiger Oil and Tiger Drilling Creditors Trust, Plaintiff in the above styled and numbered cause, complaining of Wells Fargo Bank, N.A., a national banking association, hereinafter referred to as "WFB", First Security Bank of Utah, N.A., a national banking association, hereinafter referred to as "FSB", First Security Leasing/Valley Partnership No. 1, upon information and belief a Utah general partnership, hereinafter referred to as "FSLV", and First Security/Valley Partnership No. 1, upon information and belief a Utah general partnership, hereinafter referred to as "FSV", and in support thereof would show the Court as follows:

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1332, 1334, 1335, 1471(a) and (b),

and 2201 and/or by virtue of its pendent jurisdiction over claims asserted under state law.

2. Venue in this district is proper pursuant to 28 U.S.C. §1473.

3. Plaintiff Rhett G. Campbell is the Trustee of the "Creditors Trust" (hereinafter, sometimes called the "Trust") established pursuant to the FIRST AMENDED AND CONSOLIDATED PLAN OF REORGANIZATION filed and confirmed in connection with two Chapter 11 proceedings styled and numbered In re Edward Mike Davis, d/b/a Tiger Oil Company, Case No. 80-00940-HB, and In re Tiger Drilling Co., Inc., Case No. 80-00941-HB, in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. Said Plan of Reorganization named William D. Neary, Esq., of Dallas, Texas, as

Trustee. William D. Neary has resigned and pursuant to paragraph 8.14 of the Plan of Reorganization, the Creditors Committee established under said Plan of Reorganization has named and designated Rhett G. Campbell as successor Trustee. This action is brought by Rhett G. Campbell, Trustee, in his capacity as trustee of the Creditors Trust. The Creditors Trust owns legal and/or equitable interests in certain oil and gas wells drilled by Latham Exploration Company, Inc. ("Lexco"), and is one of Lexco's creditors.

ALLEGATIONS COMMON TO ALL COUNTS

4. For a number of years, James A. Latham ("Latham"), a natural person residing in and doing business in Shreveport, Caddo Parish, Louisiana, has been engaged in the oil and gas contract drilling business, acting through Latham

Resources Corporation ("LRC"), a corporation wholly owned by Latham, and certain subsidiaries of LRC, to wit: Decca Drilling Company, Vista Drilling Company, Bailey Drilling Company, and Westwind Drilling Company. Another company through which Latham was engaged in the oil and gas contract drilling business was Lama Drilling Company, Inc. (hereinafter "Lama Drilling"), a company wholly owned by his children's trust, known variously as the Lama Trust or Trusts. At one time, Lama Drilling owned or operated 7 drilling rigs, and LRC owned or operated 17 rigs in its own name or in the names of the other subsidiaries of LRC.

5. Lexco, another wholly owned subsidiary of LRC, was organized in 1980 to (a) act as the general partner in a series of limited partnerships created

to engage in exploratory drilling operations, and (b) engage directly in oil and gas exploration activities in its own behalf.

6. In the fall of 1981, the Lexco 81-2 Program (a limited partnership) raised $18 million through investors for the purpose of exploration and production. The investor-participants put up $18 million in letters of credit, and WFB loaned $15 million to Lexco 81-2 secured by the $18 million in letters of credit. Paul Benesh, then a loan officer with WFB, solicited the loan from Lexco and it (the loan) was closed in early December, 1981.

7. Mr. Benesh then came to Latham, individually, and said that WFB would be interested in doing additional financing and/or a credit facility for LRC and its contract drilling subsidi-

aries. Latham apparently knew that the drilling business was declining, but at that time his ability to raise money through participants in drilling funds was improving. Latham decided it would be better business strategy for LRC to shift its emphasis from the drilling into the exploration and production aspect of the oil and gas business. He therefore was interested in obtaining additional financing for LRC through WFB.

8. There were meetings between Latham, Mr. Benesh, Hank Killmar, and other loan officers at WFB in January and February, 1982, regarding an additional financing facility for LRC.

9. At that time (January and February, 1982), LRC, Decca Drilling Company, Vista Drilling Company, Bailey Drilling Company, and Westwind Drilling

Company were indebted to Marine Midland Bank for approximately $25 million secured by drilling rigs and equipment. Latham attempted to borrow $45 million from WFB, $25 million of which was to refinance the debt owed to Marine Midland Bank, $10 million as a working capital line for Lexco, and an additional $10 million to purchase a block of stock in Transcontinental Oil Corporation.

10. On April 14, 1982, Latham, LRC and its subsidiaries, including Lexco, entered into a Secured Credit Agreement ("Credit Agreement") with WFB and FSB (hereinafter collectively the "Banks"), with WFB acting as lead or agent bank for FSB, pursuant to which the Banks loaned to LRC and its subsidiaries approximately $27 million to refinance the Marine Midland Bank loans secured by the drilling rigs and equip-

ment owned by LRC and its non-Lexco subsidiaries, and to provide an additional $2 million line of credit to LRC as working capital. Neither the working capital loan nor the stock purchase loan originally sought by Latham were ever funded.

11. As a condition precedent to the Credit Agreement, the Banks required that Latham, LRC, Lexco, and each of the other subsidiaries of LRC execute the Credit Agreement, and promissory note, and variously certain collateral mortgages, deeds of trust, and security agreements as co-makers and co-obligors, pledging their assets to secure the obligation of each of the other companies and/or subsidiaries. The execution of such notes by all of these entities and by Latham, individually, as co-makers and co-obligators is not a

usual or ordinary banking practice. The Banks' loan was secured principally by chattel mortgages and security interests affecting drilling rigs and equipment owned by LRC subsidiaries other than Lexco. Lexco received no benefit from the Banks' April 1982 loan, and although a co-maker on the note, Lexco in fact signed as an accommodation maker or guarantor for LRC and its other non-Lexco subsidiaries. The same was true of Latham individually.

12. At the time the Credit Agreement was executed, the amount of the debt exceeded the value of the collateral. Hence, the Banks were undersecured from the beginning of the transaction, though they apparently did not realize this until the Spring of 1983.

13. As the economy worsened, and the recession in the petroleum industry

deepened, the value of the collateral for the Banks' debt became less and less. The value of drilling rigs and equipment was especially hard hit by the petroleum industry recession, as the Banks learned in the spring of 1983.

14. Recognizing that the contract drilling business was in a deep industry-wide recession, Latham continued to move the emphasis of LRC's business into exploration and production. This was achieved by using Lexco as a vehicle to raise drilling dollars through limited partnerships, as well as by exploration and development drilling in Lexco's own name.

15. In furtherance of this goal, Lexco entered into a farmout agreement with Chevron U.S.A., Inc. ("Chevron"), dated May 12, 1982 (hereinafter, the "Chevron Farmout"), pursuant to which

Lexco could earn leasehold rights in certain Chevron leases (hereinafter, the "Tuscaloosa Leases") by drilling five Tuscaloosa trend wells in Pointe Coupee Parish, Louisiana (hereinafter, the "Tuscaloosa Wells").

16. Lexco then entered into agreements with other parties, including Edward Mike Davis, doing business as Tiger Oil Company ("Tiger Oil") and Tiger Drilling Co., Inc. ("Tiger Drilling"), under which agreements the other parties (hereinafter, the "Participants") agreed to advance funds, equipment, and/or services to participate in drilling operations contemplated by the Chevron Farmout and thereby acquire individual "working interests" in leasehold rights to be earned by Lexco under the Chevron Farmout. (The Tiger Oil and Tiger Drilling Creditors Trust, of which

Plaintiff is Trustee, has succeded to all of Tiger Oil's and Tiger Drilling's interests in these agreements.)

17. Pursuant to the Chevron Farmout, Lexco drilled each of the five Tuscaloosa Wells to total depth, three of which have been completed. The three completed wells are the "Lorio Well," which is presently producing, the "Bomer Blanks Well," which is producing through temporary facilities, and the "Bergeron Haydel Well" which is not now producing because surface facilities have not yet been installed and/or the pipeline has not been connected. The other two wells, the "Easterly Samson Well" and the "Darensbourg Well," have been abandoned or temporarily abandoned.

18. By October 17, 1983, Lexco had variously sold, transferred, or conveyed approximately 70% of the farmout

working interest in each well to outside, non-Latham family investors, and approximately 10% to either Latham family or family controlled companies and/or trusts, retaining on the average 20% of the working interest for Lexco. ["Working interest" as used herein means that portion of each oil and gas lease to be assigned to Lexco by Chevron upon the successful completion of the farmout well; in each case, Chevron retained an overriding royalty interest, convertible to a working interest, so that the net revenue interest to be assigned to Lexco allocable to its (Lexco's) working interest, before the Chevron option is exercised, was approximately a 70% net revenue interest, out of 100% of the farmout working interest.] Tuscaloosa wells are deep gas wells, being drilled to a depth of approximately 20,000 feet

beneath the surface of the land. Due to such depth, and the extraordinary pressures encountered there, such wells are expensive and difficult to drill and complete.

19. The terms of the Chevron Farmout were such that a strict schedule had to be met or Lexco would lose its rights under the farmout agreement. This included a strict drilling schedule for each of the five wells. For this reason, Lexco embarked upon the farmout drilling program without sufficient funds on hand to drill and complete the wells. WFB and FSB were aware of this and encouraged Latham to pursue this course of action.

20. Latham's and Lexco's plan apparently was to sell sufficient interests in the wells to Participants to be able to pay the drilling and completion

costs, or alternatively, to finance each well through bank borrowings, based in part upon the reserves established through the completion of each of the prior wells. However, for various reasons set forth hereafter, this did not work out as Latham and Lexco had planned.

21. Since at least January, 1983, and continuing until the present time, Lexco has been in serious financial trouble, being unable to pay for the drilling and completion of the five Tuscaloosa Wells. Mechanics' and materialmen's liens and privileges began to be filed by trade creditors in the spring of 1983. Lexco could not raise the money necessary to pay for the farmout program. However, Lexco continued to drill the five wells and ultimately

completed the farmout program on October 16, 1983.

22. In January, 1983, Lexco received from Chevron and recorded an assignment of leasehold rights on the first of the Tuscaloosa Wells, known as the Lorio Well. Lexco immediately mortgaged a 20% working interest in such well and leases to the American Bank & Trust Company in New Orleans ("American Bank") to secure a collateral mortgage note in the amount of $7.5 million, which note was pledged to the American Bank to secure a loan to Lexco of $2 million. This $2 million originally was to be used for completion costs on the Lorio Well, but at the insistance of WFB, and as a condition of executing a subordination agreement, a substantial portion of the $2 million was paid to Defendant Banks as interest on the April

1982 $27 million equipment loan owed to WFB and FSB. Lexco then conveyed and recorded the remaining interests in the Lorio Well to those Participants which had purchased interests in and had participated in drilling operations on it (the Lorio Well).

23. At or about the time of the payment of a substantial portion of the said $2 million to the Banks, the Banks agreed to refinance a portion of the indebtedness owed to the Banks, and to advance additional funds to Lexco to facilitate the completion of the Tuscaloosa Wells. In connection therewith, WFB and FSB executed a commitment letter dated April 28, 1983 (hereinafter "April 28, 1983 Commitment Letter") pursuant to which the Banks committed to lend an additional $3.2 million upon conditions stated therein. Each of the conditions

in the April 28, 1983 Commitment Letter were satisfied by Lexco, or alternatively waived by the Banks, but the $3.2 million was never funded in such a manner as to permit it to be used for completion costs on the Tuscaloosa Wells. This failure to fund was a breach of contract, and was not a usual and ordinary banking practice. Additionally, in the April 28, 1983 Commitment Letter, the Banks conditioned the extension of this further credit upon conversion of existing past due interest into an acceptable equity position in the Lorio and/or Bomer Blanks Wells -- an unlawful tying of an extension of credit to an equity ownership position in a non-banking transaction.

24. At this point, Lexco still did not have the funds necessary to pay for the drilling and completion of the

Tuscaloosa Wells, and WFB therefore executed, at Lexco's request, on May 6, 1983, another commitment letter (hereinafter the "May 6, 1983 Commitment Letter") agreeing to either fund $2 million per well for completion costs, or alternatively to subordinate the Banks' collateral position to that of another institution to the extent of the completion costs actually advanced. Although called upon to do so, the Banks never funded the $2 million per well completion costs, and additionally refused to subordinate their collateral position to that of any other entity to facilitate funding completion costs actually advanced. Such actions by the Banks were intended to and did result in a restraint of trade in credit transactions in interstate commerce.

25. The Banks persuaded Latham, LRC, and its subsidiaries to enter into a third amendment to the Secured Credit Agreement (hereinafter "Third Credit Agreement") in reliance upon the Banks' statement of intent to issue the two Commitment Letters referenced above. Pursuant to the Third Credit Agreement the Banks agreed to increase their existing loan to Latham by $5.5 million, with the proceeds to be used to repay existing indebtedness, pay liens (presumably mechanics' and materialmen's liens on the Tuscaloosa Wells), and for working capital. Some part of the $5.5 million loan was funded and was apparently used for the benefit of Lexco. Most of the funds were not used for the benefit of Lexco, and upon information and belief, were used to fund past due interest obligations owed to the Banks

or for other obligations paid for the benefit of Banks, through other non-Lexco entities. By requiring the use of the funds for purposes other than those proposed and budgeted, the Banks engaged in unusual and abnormal banking practices in restraint of trade.

26. As a condition of extending credit pursuant to the Third Credit Agreement, the Banks required Lexco to pay interest to the Banks of approximately $3.5 million due on the original 1982 loan to LRC by assigning to WFB a production payment out of Lexco's interest in the Tuscaloosa Wells in the amount of $6,529,852.00. Such production payment was executed on May 11, 1983, and was recorded on May 17, 1983, in the Real Property Records of Pointe Coupee Parish, Louisiana, Conveyance Book No. 248, Entry No. 2. In addition

to other collateral given to Banks by other co-makers, Lexco secured the Banks' $5.5 million loan of April 14, 1983 and all preexisting indebtedness, including the $27 million note of April 14, 1982, by collateral mortgages, deeds of trust, assignments of partnership interests, and security interests as follows:

(a) Collateral Mortgage dated April 14, 1983, affecting a 20% working interest in the Lorio Well, subordinate to the American Bank mortgage, to secure a $175 million collateral mortgage note, which collateral mortgage was recorded on April 26, 1983 in Conveyance Book 246, Entry 135 of the Real Property Records of Point Coupee Parish, Louisiana.

(b) A Collateral Mortgage dated April 14, 1983, on any and all other farmout leases earned or to be earned by Lexco under the Chevron Farmout other than the Lorio Well, recorded on April 26, 1983 in Conveyance Book 246, Entry 133 of the Real Property Records of Pointe Coupee Parish, Louisiana.

(c) A Pledge and Assignment of Contract Rights by Lexco to Banks, executed on April 14, 1983, and never recorded in the Real Property Records except as an attachment to an affidavit recorded on September 15, 1983 in Conveyance Book 254, Entry 37 of the Real Property Records of Pointe Coupee Parish, Louisiana.

(d) A Collateral Mortgage of all of Lexco's partnership interest in the Lexco 82-1 Program and the Lexco 82-2 Program, in and to the partnership interests in the Tuscaloosa Wells drilled under Chevron Farmout, which Collateral Mortgage and Assignment of Partnership Interests was executed on April 14, 1983, and recorded on April 26, 1983 in Conveyance Book 246, Entry 132, of the Real Property Records of Pointe Coupee Parish, Louisiana.

(e) An Assignment of Partnership Interests of various Lexco drilling programs, insofar as they covered Lexco's partnership interest in said drilling programs, recorded on April 26, 1983 in Conveyance Book 246, Entry 136 of the

Real Property Records of Pointe Coupee Parish, Louisiana, and apparently covering the same interests as the Collateral Mortgage and Assignment of Partnership Interests described in the immediately foregoing subparagraph.

(f) An Assignment of Lexco's partnership interest in the Lexco 82-2 Program, insofar as it covers Lexco's interests in said partnerships, executed on April 14, 1983, and recorded on April 26, 1983, in Conveyance Book 246, Entry 134 of the Real Property Records of Pointe Coupee Parish, Louisiana.

(g) A Collateral Mortgage, Collateral Chattel Mortgage, Pledge, and Assignment of Production, executed by Lexco, to secure

certain Master Lease obligations of Lama Drilling, for the benefit of FSLV and FSV, covering any and all of Lexco's interests in the wells drilled under Chevron Farmout, executed on May 6, 1983, and recorded on May 13, 1983, in Conveyance Book 247, Entry 133, of the Real Property Records of Pointe Coupee Parish, Louisiana, but expressly subordinate to the prior mortgage to WFB of Lexco's interest in the wells drilled under the Chevron Farmout.

(h) Act of Amendment to Collateral Mortgage, Collateral Chattel Mortgage, and Pledge of Production dated April 14, 1983, for Lexco's interest in the Lexco 80-1, 81-1, and 81-2 Programs, insofar as they cover the interest

of Lexco in said partnerships, recorded variously on April 27, 1983 and May 12, 1983, in the Real Property Records of Webster, Claiborne, Union, Concordia, and Caddo Parishes, Louisiana.

(i) A Collateral Chattel Mortgage dated April 14, 1983, pledging to WFB certain drilling rigs owned by Lexco, being Rigs Nos. 37, 51, and 55, recorded on May 13, 1983 in the Chattel Mortgage Records of Pointe Coupee Parish, Louisiana.

(j) Deed of Trust, Security Agreement, Assignment of Production, and Financing Statement executed by Lexco for the benefit of WFB, pledging Lexco's interest in certain producing oil and gas wells in Jefferson Davis County,

Mississippi, recorded on some date after April 28, 1983 in the Real Property Records of Jefferson Davis County, Mississippi.

(k) First Amendment to Deed of Trust, Security Agreement, Assignment of Production, and Financing Statement dated April 13, 1983, executed by Lexco as to its interest in the Lexco 80-1 Program, recorded on April 26, 1983 in the Real Property Records of Jasper, Franklin, Yazoo, Wilkinson, and Jones Counties, Mississippi, and affecting Lexco's interest in certain Lexco 80-1 Program producing oil and gas properties.

(l) Mortgage, Security Agreement, Assignment of Production, and Financing Statement exe-

cuted by Lexco for the benefit of WFB, dated April 14, 1983, covering certain producing oil and gas properties in Roosevelt County, Montana, recorded on April 20, 1983 in Book 449, page 447, File No. 298760 of the Real Property Records of Roosevelt County, Montana.

(m) First Amendment to Mortgage, Security Agreement, Assignment of Production, and Financing Statement dated May 6, 1983, executed by Lexco for the benefit of WFB, recorded on May 17, 1983, in Book 454, Page 225, under File No. 299306 of the Real Property Records of Roosevelt County, Montana, and covering certain producing oil and gas proper-

ties owned by Lexco as set forth therein.

(n) Amendment to Mortgage, Deed of Trust, Security Agreement, Assignment of Production, and Financing Statement, executed by Lexco, et al., for the benefit of WFB, executed on May 6, 1983, and recorded on May 13, 1983, under File Code No. 451182 of the Real Property Records of Williams County, North Dakota, and covering Lexco's interest in certain producing oil and gas properties owned by the Lexco 81-2 Program as set forth therein.

(o) Deed of Trust, Security Agreement, Assignment of Production, and Financing Statement executed by Lexco for the benefit of WFB, executed on April 14, 1982

covering Lexco's interest in certain producing oil and gas properties owned by the Lexco 81-2 Program in Crockett County, Texas, and recorded on May 5, 1983, at Volume 118, Page 734, under File No. 87179 of the Deed of Trust Records of Crockett County, Texas.

(p) First Amendment to Deed of Trust, Security Agreement, Assignment of Production, and Financing Statement for Lexco, as to Lexco's interest in certain producing oil and gas properties owned by the Lexco 81-1 and 81-2 Drilling Programs in Pecos, Crockett, Mitchell, Lipscomb, Rusk, Panola, and Harrison Counties, Texas, recorded on May 19, 1983, at Volume 119, Page 275 of the Deed of Trust Records of Crockett

County, Texas; on April 27, 1983, at Volume 205, Page 763 of the Deed of Trust Records of Pecos County, Texas; on April 22, 1983 and May 6, 1983, at Volume 143, Page 39 of the Deed of Trust Records of Mitchell County, Texas; on April 26, 1983, at Volume 315, Page 260, of the Deed of Trust Records of Rusk County, Texas; on an uncertain date, at Volume 1011, Page 164, under File No. 04223, of the Deed of Trust Records of Hood County, Texas; on an uncertain date at Volume 175, Page 735, under File No. 60209, of the Deed of Trust Records of Panola County, Texas; on April 26, 1983, at Volume 353, Page 383, of the Deed of Trust Records of Harrison County, Texas.

(q) Financing Statement executed by Lexco for certain drilling rigs, being Drilling Rigs Nos. 37, 51, and 55, recorded in the UCC Records of the Secretary of State of the State of Wyoming on May 6, 1983, under File No. 204756.

(All of the above being hereinafter referred to in the aggregate as the "April 1983 Collateral"). The value of the April 1983 Collateral was greatly in excess of the amount of new credit extended to Lexco or for Lexco's use. This great disparity between the amount lent and the Collateral required is not consistent with usual banking practices.

27. In the Pledge and Assignment of Contract Rights executed on April 14, 1983, WFB agreed to release its collateral mortgage on interests in the Tusca-

loosa Wells which Lexco might elect to sell for the purpose of enabling Lexco to raise money with which to complete the Tuscaloosa program. In addition, WFB agreed by the May 6, 1983 Commitment Letter to advance funds to complete the Tuscaloosa Wells or alternatively to subordinate its collateral mortgages to other parties who would elect to lend Lexco completion costs. Although requested to do so, WFB refused to release its collateral and pledge so that Lexco could sell additional interests in the Tuscaloosa Wells for the purpose of completing same, and further refused to lend Lexco the completion costs. Such failure to honor commitments were not usual and normal banking transactions.

28. At the end of September, 1983, Lexco's aggregate indebtedness to

trade creditors for labor, materials, and services furnished in connection with the drilling and completing of the Tuscaloosa Wells was in excess of $20 million, all of which Lexco was unable to pay.

29. Even though Lexco has drilled and completed (or plugged and abandoned, as appropriate) the five Tuscaloosa Wells as provided in the Chevron Farmout, liens and privileges have been filed against all of the Tuscaloosa Wells and Tuscaloosa Leases by unpaid trade creditors, and Chevron has therefore refused to assign (and sublease) the leasehold rights of any well other than the Lorio Well in accordance with the Chevron Farmout.

30. On October 17, 1983, Lexco filed a Petition for Reorganization under Chapter 11 of the United States

Bankruptcy Code in the United States Bankruptcy Court for the Western District of Louisiana, Shreveport Division, Case No. 583-01408-S.

31. At all times relevant to the transactions described herein, James A. Latham was the 100% shareholder of LRC, which in turn was the 100% shareholder of Lexco and the other subsidiaries described herein; Latham was the sole active director of each of the Latham related companies; Latham was the president of LRC, Lexco, and each of the other relevant corporations; Latham was the creator of the Lama Trusts and was the original assignor of the assets making up the assets of the Lama Trusts; the Lama Trusts were the 100% shareholders of Lama Drilling; Latham was the sole director or alternatively elected and controlled the directors of Lama

Drilling; Latham was the president and controlling officer of Lama Drilling. All shares of stock of LRC, Lexco, and all other Lexco related entities were pledged by Latham to WFB and FSB.

32. At all times relevant herein, WFB, FSB, FSLV, and FSV were insiders, as that term is used in 11 U.S.C. §101(25), as to Lexco, in that, inter alia, because of their almost total control over Latham's and his companies' finances, the Defendants each, individually, and in concert with each of the other Defendants, were in a position to control, and did control the actions and activities of Latham, LRC, Lexco, and the other companies involved. At all times relevant herein, WFB and FSB required pledges of stock of all of Latham's companies to WFB and FSB by all shareholders to secure the performance

and timely payment of the $27 million of LRC indebtedness, as well as any and all other indebtedness or obligations owing to WFB, FSB, FSLV, or FSV by Latham, LRC, Lexco, or any other subsidiary of LRC, or Lama Drilling.

33. As further evidence of said control, it is significant to note that the Banks were undersecured as of April, 1982, when they first advanced the $27 million secured by drilling rigs and equipment. In an effort to obtain a fully secured position, they wrongfully exerted control and domination over Latham, LRC, Lexco, and the other subsidiaries of LRC, and Lama Drilling, by directing the activities of the common shareholder, directors and officers of all corporations and debtors as set forth above. The Defendant Banks thwarted, prevented, and interfered with

the lawful and proper business decisions of each of the corporations described above. The Defendant Banks required Latham, LRC, Lexco, and the other subsidiary corporations of LRC to be co-makers on each of the promissory notes executed by any of the common companies, even though there was no legitimate business purpose for each of Latham, LRC, Lexco, and the other subsidiaries of LRC to be co-makers and co-obligors on such indebtedness. WFB and FSB required Lexco to guarantee the debt of Lama Drilling to FSV and FSLV for no legitimate business reason and for little or no consideration, and further required that Lexco Rigs Nos. 37, 51, and 55 and other assets be pledged by Lexco to FSV and FSLV, wholly owned and/or controlled partnerships of FSB, to secure indebtedness owing to FSV and FSLV by Lama

Drilling and its 100% shareholder, the Lama Trusts, even though there was no legitimate business purpose for same.

34. In an effort to continue their unlawful dominance and control of Latham, LRC, Lexco, and the other subsidiaries of LRC, WFB and FSB promised to subordinate their collateral mortgages to other investors or lenders who would lend completion costs on the Tuscaloosa Wells, at a time when the Banks had no intention to subordinate and when called upon to do so, refused to so subordinate their mortgage position. As furtherance of their effort to dominate and control Latham, LRC, Lexco, and the other subsidiaries of LRC, WFB and FSB promised to fund completion costs or alternatively to subordinate, and when called upon to fund completion costs, refused to do so, and when called upon

to subordinate, refused to do so. The representations of WFB and FSB that they would so subordinate or fund completion costs were false when they were made, were known by them to be false when they were made, and were made by them with the intent that Latham, LRC, Lexco, and the other subsidiaries of LRC would rely upon such representations. Latham, LRC, Lexco, and the other subsidiaries of LRC did rely upon such representations, to their detriment and, ultimately, to the detriment of their participants and creditors.

COUNT I

UNLAWFUL BANKING PRACTICES

35. Latham, Lexco, LRC and other LRC related companies, including Lama Drilling and the Lama Trust, were customers of the Banks as that term is used in 12 U.S.C. §1972(1). (Hereinafter,

these entities will be referred to as the "Customer".)

36. In violation of 12 U.S.C. §1972(1), WFB and FSB have extended credit, and leased property, and fixed or varied the consideration for the foregoing, on the condition or requirement that (1) the Customer shall obtain some additional credit from the Banks, other than a loan, discount, deposit, or trust service; (2) the Customer shall obtain some additional credit from a subsidiary of a bank holding company of such Banks; (3) the Customer provide some additional credit, property, or service to such Bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service; (4) the Customer provide some additional credit, property, or service to a bank holding com-

pany of such Bank, or to any other subsidiary of such bank holding company; or (5) the Customer shall not obtain some other credit, property, or service from a competitor of such Bank, a bank holding company of such Bank, or any subsidiary of such bank holding company, other than a condition or requirement that such Bank shall reasonably impose in a credit transaction to assure the soundness of the credit, all as set forth hereafter.

37. As a means of effecting the foregoing, WFB and FSB conspired with FSLV and FSV and tied the original 1982 $27 million credit to the condition that Latham and LRC require Lexco and each other subsidiary of LRC to become a co-maker and common obligor of the $27 million obligation, to the condition that Latham, LRC, Lexco, and the other

subsidiaries of LRC subject their assets to the common creditor banks of Latham and LRC, who were, in turn, controlled by WFB and FSB, and to the required cross-obligation and cross-collateralization of all assets of Latham, LRC, Lexco, and the other subsidiaries of LRC to secure the entire $27 million obligation which was theoretically an obligation of each of the other co-obligors.

38. WFB and FSB tied and conspired with each other and with FSLV, FSV and others to tie, the extension of the April 19, 1983 additional credit to an equity position in the Tuscaloosa Wells and, later, tied the extension of credit in April and May, 1983, to a production payment out of the Tuscaloosa Wells.

39. WFB and FSB tied the extension of credit in April and May, 1983,

to the required guarantee by Lexco of Lama Drilling Company's debt to FSV and FSLV, and to the pledge by Lexco of Lexco Rigs Nos. 37, 51, and 55 to FSV and FSLV to secure Lexco's guaranty, for no legitimate business purpose, and further required that Lexco pledge said rigs to FSV and FSLV, wholly owned subsidiaries or partnerships of FSB or FSB's holding company, such obligations being obligations of Lama Drilling to FSV and FSLV, but wholly unrelated to Lexco or any legitimate business purpose of Lexco, and not even being an obligation previously guaranteed by Lexco.

40. WFB and FSB unlawfully tied the April-May 1983 extension of credit to certain business relations between Lexco and Lama Drilling, requiring that Lexco guarantee and indemnify Lama Drilling Co., Inc.'s and Lama Trust's

creditors, for no legitimate business purpose, other than for the benefit of FSB.

41. WFB and FSB tied the April-May 1983 extension of credit to Latham's, LRC's, Lexco's, and the other subsidiaries of LRC's non-use of other banks' credit facilities, specifically excluding Bossier Bank, even though Lexco and other LRC entities desired to utilize credit facilities of Bossier Bank.

42. WFB and FSB unlawfully tied the original 1982 credit, as well as the April-May 1983 extension of credit, to the Lexco guaranty of the Lama Trust lease obligations owing to FSV and FSLV, including an agreement to indemnify same for loss, and further requiring the mortgage by Lexco of its interests in the Tuscaloosa Wells to FSV and FSLV, by

Collateral Mortgage executed on May 6, 1983, recorded in Conveyance Book 247, Entry 133, on May 17, 1983, in the Real Property Records of Pointe Coupee Parish, Louisiana, none of which had any legitimate business purpose of or benefit to Lexco and only benefited FSV, FSLV, and FSB.

43. All of the acts alleged in paragraphs 35 through 42, above, are unlawful extensions of credit on the condition or requirement that the Customer provide an additional credit, property, or service to WFB, FSB, FSLV and/or FSV in a manner inconsistent with usual banking practices all as set forth above.

44. By reason of the foregoing unlawful tying violations, WFB, FSB, FSLV and FSV have caused the Creditors

Trust of which Plaintiff is trustee to incur substantial damages as follows:

(a) The Trust's interest in the Lorio, Bomer Blanks, and Bergeron Wells, 12.5%, 6.25% and 6.25% respectively, have become burdened by approximately $28 million of mechanics' and materialmen's liens and privileges which the Trust's interest may ultimately have to pay; these liens would not have been filed but for Lexco's inability to finance the drilling and completion of the Tuscaloosa Wells, which inability was directly caused by WFB's, FSB's, FSV's, and FSVL's unlawful acts and practices in restraint of trade;

(b) The Trust's ownership interest in the Lorio, Bomer

Blanks, and Bergeron Wells have become embroiled in Lexco's Chapter 11 proceeding so that the owners' runs have been suspended; there is presently in suspense approximately $5.2 million in runs from the Lorio and $4.7 million in runs from the Bomer Blanks, of which the Trust owns 12.5% and 6.25% respectively, and which would have been distributed to the Trust but for the interposition of the Chapter 11 proceeding, which in turn was caused by the unlawful acts and practices of WFB, FSB, FSV, and FSLV as described above; the amounts of suspended runs will not likely decrease but will likely increase;

(c) The Trust, Lexco, and the other owners of the Bomer

Blanks Well had an option to drill and complete another well on the Bomer Blanks prospect, known as the Bomer option well, and which the Trust was deprived of principally due to the Chapter 11 proceeding, caused by the unlawful acts and practices of WFB, FSB, FSV, and FSVL as described above; and

(d) The unlawful acts and practices of WFB, FSB, FSV, and FSVL caused assets of Lexco to be pledged to secure non-Lexco debt owed to WFB, FSB, FSV, and FSVL, without which Lexco would have been solvent (or alternatively less insolvent), and without which Lexco would have had sufficient assets to pay its creditors and prevent the filing of $28 million

in mechanics' and materialmen's liens and privileges which encumber the Trust's interests, to the Trust's substantial detriment and damage.

45. Pursuant to 12 U.S.C. §1975, Plaintiff is entitled to recover in behalf of the Creditors Trust three times the Trust's actual damages, costs, and reasonable attorneys' fees.

COUNT II

LOUISIANA REVOCATORY ACTION

46. This Count is brought pursuant to Articles 1970 through 1994 of the Louisiana Civil Code. The Creditors Trust is a perfect judgment lien creditor under state law and Plaintiff, as Trustee, seeks revocation of the collateral mortgages and security interests of WFB and FSB.

47. The following instruments, which are recorded in the Real Property Records of Pointe Coupee Parish, Louisiana, are voidable pursuant to the Revocatory Action Articles of the Louisiana Civil Code, Articles 1970 through 1994, to all creditors of Lexco:

(a) Collateral Mortgage executed by Lexco on April 14, 1983, recorded in Conveyance Book 246, Entry 135, on April 26, 1983;

(b) the Collateral Mortgage executed by Lexco on April 14, 1983, and recorded in Conveyance Book 246, Entry 133, on April 26, 1983;

(c) the Pledge and Assignment of Contract Rights executed by Lexco on April 14, 1983, recorded as an attachment to an

affidavit in Conveyance Book 254, Entry 37, on September 15, 1983;

(d) the Collateral Mortgage of Lexco Partnership Interests in Lexco Drilling Program 82-1 and Lexco 82-2, recorded in Conveyance Book 246, Entry 132, on April 26, 1983;

(e) the Assignment of Lexco Partnership Interests in Lexco 82-2 Drilling Program recorded in Conveyance Book 246, Entry 134, on April 26, 1983;

(f) the Assignment of Lexco's Partnership Interests in Lexco Various Drilling Programs recorded in Conveyance Book 246, Entry 136, on April 26, 1983;

(g) the Production Payment executed by Lexco on May 11,

1983, recorded on May 17, 1983, in Conveyance Book 248, Entry 2;

(h) and the Collateral Mortgage, Collateral Chattel Mortgage, Pledge, and Assignment of Production executed by Lexco on May 6, 1983, to secure certain Master Lease agreements to FSLV and FSV, executed on May 6, 1983, and recorded on May 13, 1983 in Conveyance Book 247, Entry 133.

48. The conveyances of the mortgages, deeds of trust, and security interests described in the immediately preceding paragraph 47 were made without fair and adequate consideration.

49. The conveyance of the mortgages, deeds of trust, and security interests described in paragraph 47 were made while Lexco was insolvent.

50. The conveyance of the collateral mortgages, deeds of trust, and security interests described in paragraph 47 rendered Lexco insolvent.

51. WFB, FSB, FSLV, and FSV knew that Lexco was insolvent at the time the mortgages, collateral mortgages, and security interests described in paragraph 47 were executed and conveyed.

52. The conveyance of the security interests described in paragraph 47 gave the Banks and FSLV and FSV an advantage over the other creditors of Lexco.

53. The collateral mortgages, mortgages, and security interests described in paragraph 47 were obtained by WFB, FSB, FSLV, and FSV through fraud and in bad faith and therefore their entire indebtedness is annulled pursuant

to Article 1982 of the Louisiana Civil Code.

COUNT III

EQUITABLE SUBORDINATION

54. Pursuant to 11 U.S.C. §510(c), for the reasons set forth in the foregoing paragraphs, and for the reasons set forth hereafter, the allowed claims of WFB, FSB, FSLV, and FSV should be subordinated to all other unsecured creditors and claims as may be allowed in connection with the Lexco Chapter 11 proceeding because of the inequitable conduct, unfair advantage, and willing acceptance of fraudulent conveyances having been made by the Defendants.

55. The allegations regarding fraudulent misrepresentations of the Banks' intent to fund completion costs and/or subordinate to other lenders, and

refusal to do so, together with allegations of inequitable conduct, unfair advantage, unlawful economic duress and coercion, and the domination and control of Latham, LRC, Lexco and the other subsidiaries of LRC, as set forth above are incorporated herein by reference.

56. The mortgages, deeds of trust, security interests, and financing statements more specifically described in paragraph 26 above were all granted by Lexco within one year prior to the date of filing the Chapter 11 Petition and are therefore voidable and fraudulent transactions pursuant to 11 U.S.C. §548 of the Bankruptcy Code in that

(a) Lexco received less than a reasonably equivalent value for its transfer or conveyance of each of the mortgages, deeds of trust, security interests, and

financing statements described above.

(b) The conveyance of the mortgages, deeds of trust, security interests, and financing statements was made while Lexco was insolvent.

(c) The conveyance of the mortgages, deeds of trust, security interests, and financing statements caused Lexco to become insolvent.

(d) The conveyance of the mortgages, deeds of trust, security interests, and financing statements were made while Lexco was engaged in business and for which its remaining property was unreasonably small capital.

(e) The conveyance of the mortgages, deeds of trust, secur-

ity interests, and financing statements was made while Lexco intended to incur debts beyond its ability to pay as such debts matured.

(f) The conveyance of the mortgages, deeds of trust, security interests, and financing statements was made with the actual intent to hinder, delay, or defraud Lexco's other creditors.

57. The fraudulent nature of the conveyances described herein is especially clear in light of the fact that Lexco was an accommodation maker and a guarantor as to the obligations of Latham, LRC, and the other subsidiaries of LRC, having received little or none of the consideration of the principal indebtedness (in 1982) for which such mortgages, deeds of trust, security

interests, and financing statements were given as collateral.

58. Through the exercise of wrongful control and domination of Latham, Lexco, LRC, and the other subsidiaries of LRC, WFB and FSB have thwarted, prevented, and interfered with the lawful and proper business decisions and activities of Lexco.

59. The Banks have engaged in inequitable conduct which has resulted in injury to the investors and Participants in the drilling activities of Lexco and have conferred an unfair advantage on the Banks.

60. The inequitable conduct referred to above includes, inter alia, the assertion of the Banks of the priority of their mortgages over the investors interests where the Banks never intended to achieve priority over the

investors, but only intended to establish liens on the farmout interests which Lexco and Latham would retain after the interests of the Participants had been assigned the rights which were to be transferred to the Participants.

61. The Banks were aware of, permitted, and assisted Latham in the fraudulent marketing of interests in the Tuscaloosa Wells to the Participants in order to bring additional funds into Lexco in order to complete the Tuscaloosa Wells and thereby increase the value of the security the Banks held in Lexco. By the reason of such action, the allowed claims of WFB, FSB, FSLV, and FSV should be subordinated to all other unsecured claims and creditors.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon a full and final hearing of this Com-

plaint, that the Court will grant Plaintiff relief against Defendants, WFB, FSB, FSLV and FSV as follows:

(a) As to Count I, that the Court will award Plaintiff three times the Creditors Trust's actual damages against WFB and FSB, and their co-conspirators, FSLV and FSV, suffered as a result of the Defendants' unlawful banking practices for costs, and will also award Plaintiff his attorneys' fees;

(b) As to Count II, that the Court will revoke and annul those certain collateral mortgages, security interests, pledge and assignment of contract rights, and assignments of partnership interests transferred and conveyed by Lexco to Defendants, WFB, FSB, FSLV and FSV, all as more specifically described above in paragraph 47 and that

the Court will annul the debt of Lexco to WFB, FSB, FSLV, and FSV;

(c) As to Count III, that the Court will equitably subordinate the secured and unsecured claims of Defendants, WFB, FSB, FSLV, and FSV, to Plaintiff's claims;

(d) As to all the above Counts, that the Court will grant Plaintiff his costs and attorneys' fees not otherwise previously allowed; and

(e) That the Court will grant Plaintiff such other and further relief, both at law and in equity, as to which Plaintiff may show himself to be justly entitled.

Respectfully Submitted,

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JURY TRIAL DEMANDED